

MEMORANDUM

To: Parties in PSB Docket No. 7440

From: James Volz, Chairman

Re: Participation in Vermont Yankee Relicensing Proceeding

Date: November 7, 2008

On October 21, 2008, Conservation Law Foundation ("CLF") filed a letter asking that I:

issue a statement to the parties outlining [my] prior involvement as the Director for Public Advocacy for the Vermont Department of Public Service (DPS) in developing, negotiating, structuring, approving, reviewing or drafting the Memorandum of Understanding (MOU) among Entergy Vermont Yankee, the DPS and other parties dated March 3, 2002 and approved by the Public Service Board in Docket 6545

CLF contends that in the current docket, the Public Service Board ("Board") "will be reviewing the MOU and will make determinations regarding its meaning and application." CLF notes that Entergy Nuclear Vermont Yankee, LLC has filed testimony "regarding the meaning, application and claimed benefits of what [Entergy] calls the revenue-sharing provision in paragraph 4 of the MOU." CLF states:

At the time the MOU was executed and approved by the PSB, Chairman Volz served as the DPS Director for Public Advocacy. 30 V.S.A. § 1. In this capacity, Chairman Volz likely gained personal knowledge of facts regarding the MOU. Those facts may be relevant to the PSB's evaluation and interpretation of the MOU as part of this current proceeding. CLF requests that Chairman Volz's [sic] provide information describing his prior involvement and knowledge and how his current participation in this proceeding meets the requirements of the Vermont Code of Judicial Conduct.

CLF points to a provision of the judicial Code that calls for a judge to be disqualified if he or she has "personal knowledge of disputed evidentiary facts concerning the proceeding." A.O. 10, Canon 3E(1)(a).

In this memorandum I will provide, to the best of my recollection, the details of my prior involvement with respect to the MOU, and I will then address the significance of that past involvement in Docket 6545 to my current participation in Docket 7440.

As background, I became Chairman of the Board effective March 1, 2005. Prior to that, I worked at the Department of Public Service ("Department") from 1985 until my appointment as Board Chairman, serving as the Department's Director for Public Advocacy since 1989.

A substantial length of time – over six and one-half years – has passed since the Docket 6545 MOU was negotiated and executed. To the best of my recollection, I believe I may have been involved to some extent in settlement discussions in Docket 6545 on behalf of the Department, but I have no recollection of any specifics of the settlement negotiations or any specifics of the Department's internal discussions regarding possible settlement of that docket. I have no recollection of any settlement negotiations or internal Department discussions regarding the revenue-sharing provision of paragraph 4 of the MOU.

Turning to the relevant standards of conduct, CLF asserts that "the members of the PSB must abide by the Vermont Code of Judicial Conduct," citing that Code and 30 V.S.A. § 9. However, the Vermont Supreme Court has held that the Code of Judicial Conduct does not apply to administrative tribunals. *McIsaac v. University of Vermont*, 2004 VT 50, ¶ 20, 177 Vt. 16, 25; *In re Crushed Rock, Inc.*, 150 Vt. 613, 623 (1988).¹ Instead, the relevant applicable standards are found in 12 V.S.A. § 61 and the Board's Code of Ethics, with the Board looking to the Code of Judicial Conduct for guidance.

Section 61(a) of 12 V.S.A. provides, in relevant part:

A justice of the supreme court, judge, juror or other person shall not act in a judicial capacity in or as trier of a cause or matter in which he has been retained or acted as an attorney or counsel, or is interested in the event of such cause or matter

¹CLF's citation to 30 V.S.A. § 9 does not support a contrary conclusion. Section 9 provides that "[t]he board shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction." The fact that the legislature has given the Board the *powers* of a court did not transfer the Board into the judicial branch subject to the administrative supervision of the Vermont Supreme Court, and thus that Court's Code of Judicial Conduct does not apply to the Board's members.

The Board's Code of Ethics provides, in relevant part, that a Board Member

. . . shall take all reasonable steps to avoid any action or circumstance, whether or not specifically prohibited by this code, which might result in, or create the appearance of . . . undermining his or her independence or impartiality of action . . . or . . . affecting adversely the confidence of the public in the integrity of the Public Service Board.²

In light of these standards, the fundamental question raised by CLF's letter appears to be whether, as a result of my prior involvement on behalf of the Department in the formation of the Docket 6545 MOU, I gained personal knowledge of facts regarding the MOU such that my impartiality or integrity might reasonably be called into question or the public's confidence in the integrity of the Board might be adversely affected. Here the Vermont Code of Judicial Conduct provides helpful guidance. As CLF notes, the judicial Code calls for a judge to be disqualified if he or she has "personal knowledge of disputed evidentiary facts concerning the proceeding." A.O. 10, Canon 3E(1)(a).

In the current proceeding, I am unaware of any disputed evidentiary facts of which I have personal knowledge because, first, while it is true that an Entergy witness has submitted prefiled testimony concerning the revenue-sharing provision of MOU paragraph 4, it is not clear that there are any evidentiary facts in dispute related to the formation of the MOU.

Second, as explained above I have no recollection, either specific or general, of the negotiations and the Department's internal discussions related to the revenue-sharing provision of the MOU. Thus, even if there were disputed facts concerning the revenue-sharing provision, I have no personal knowledge of relevant facts.

For these reasons, I do not believe that my former involvement in Docket No. 6545 would present a conflict of interest or would in any way affect my impartiality in this proceeding or the public's confidence in the integrity of the Board, and thus I do not believe that I am disqualified from sitting on this case. Furthermore, I am confident that I will be able to consider the issues and decide this matter in a fair, unbiased fashion based on the evidence in the record.

Any party that would like to comment on these issues should do so by December 1, 2008.

²Board Code of Ethics at ¶ 1(a) and (f).